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Teleconference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 YUNJIAN LIN, et al.,

4 Plaintiffs,

5 v.

15 Civ. 2950 RA

6 GRAND SICHUAN 74th St., INC., et al.,

7 Defendants.

8 -----x

9
10 April 11, 2019
11 3:00 p.m.

12
13
14 Before:

15 HON. RONNIE ABRAMS,

16 District Judge

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18 APPEARANCES

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21 AARON SCHWEITZER, (Telephonically)
22 Attorney for plaintiffs

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(Teleconference in Chambers)

THE COURT: Mr. Schweitzer?

MR. SCHWEITZER: Yes, Judge.

THE COURT: Hi. Good afternoon.

MR. SCHWEITZER: Good afternoon.

THE COURT: All right. So I wanted to discuss the outstanding issue with respect to service of the Second Amended Complaint and plaintiffs' motion for default judgment, all right?

MR. SCHWEITZER: Yes, Judge.

THE COURT: Let's start with the Second Amended Complaint. At the order to show cause hearing on January 10, I first addressed why service of the Second Amended Complaint was not proper as to defendants Guang Jun Li, Yong Shu Li and Cheng Chen, and I explained at the conference these defendants must be served under Rule 4 of the Federal Rules of Civil Procedure.

You had previously filed affidavits of service attesting these defendants were served on December 27, 2016 through "nail and mail" at each of their purported dwellings, after two previous unsuccessful attempts.

On January 9th, just before the order to show cause hearing, you filed affidavits of service attesting that your motion for default and supporting papers, which included a copy of the Second Amended Complaint, were served on these

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1 defendants via mail only, on December 14th.

2 It appears you were trying to serve these defendants
3 under New York State Law, which is, of course, authorized by
4 Rule 4. But as I explained at the conference, the Second
5 Circuit has recognized there is substantial authority for the
6 proposition that three attempts at residential service do not
7 satisfy the due diligence requirement, where the process server
8 made no attempt to serve the defendant at his actual place of
9 business, in particular where the place of business was known.

10 That is a quote from the Sartor versus Toussaint case,
11 70 at F.App'x 11, 14. The affidavits of service do not
12 indicate you mailed the documents to defendants' place of
13 business even though the complaint establishes that you're
14 aware of the place of business of these defendants, and so that
15 is why I directed you to re-serve.

16 On March 4th, you filed the same affidavits of service
17 that you filed before the order to show cause hearing. On
18 March 8th, you filed affidavits of service attesting that you
19 served a copy of my February 26th order on all defendants but
20 only by mail.

21 So in short, you still haven't properly served those
22 three defendants with the Second Amended Complaint, and to
23 serve these defendants in accordance with New York State Law
24 pursuant to CPLR 308(4), you also need to file proofs of
25 service on the docket within 20 days of fixing or mailing the

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1 Second Amended Complaint, which you haven't done here, either.

2 Turning to the service of the motion for default with
3 regard to the remaining defendants, my November 29th, 2018
4 order directed you to serve defendants with a copy of that
5 order and your motion for default and supporting papers in
6 compliance with Rule 4.

7 As I have noted today and at the January conference,
8 you served those papers on December 14th by mail only, which
9 again does not comply with Rule 4. After directing you to
10 serve those papers again on January 22nd and February 26th, you
11 still have not done so.

12 So in my February 26th order I warned you that if you
13 did not properly serve defendants, I would dismiss the case
14 without prejudice. I am going to give you one more chance to
15 get this right, so please carefully consult CPLR 308 if that is
16 the rule you're going to follow with service.

17 If you're going to serve defendants through mail and
18 mail, you first need to attempt "with due diligence" to serve
19 the defendants by delivering the papers in person; or with
20 suitable and age and discretion, at defendants' actual place of
21 business, dwelling place or usual place of abode, and by mail
22 at their last known residence or by first class mail to their
23 actual place of business. Then you need to file proof of
24 service within 20 days thereafter.

25 I am going to issue an order giving you until April

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1 26th to properly serve defendants with, and until May 3rd,
2 2019, to file proof of service on the docket. If you fail to
3 do so, I am going to dismiss the case. If you do comply with
4 it and properly serve in that time period, then defendants Yong
5 Shu Li, Cheng Chen and Guang Jun Li, must answer the Second
6 Amended Complaint, and the court would issue a separate order
7 to show cause as to the remaining defendants. So I am going to
8 issue that order today, but I just wanted to make that clear
9 for the record. All right?

10 MR. SCHWEITZER: Yes, your Honor. May I ask a
11 question?

12 THE COURT: Sure.

13 MR. SCHWEITZER: The place of business is no longer
14 the defendants' actual place of business. It hasn't been for
15 some time. Therefore, it wouldn't be efficacious to attempt
16 service there, and we don't know any further addresses for the
17 defendants other than the abodes that we served as of December
18 of 2016. That being the case, I can only foresee that service
19 will ultimately end up being by mail and nail at the last known
20 addresses where they resided pursuant to CPLR 308-4.

21 THE COURT: Look, I think I have laid out the law
22 pretty clearly a couple of times now. Consult the law, review
23 the provisions, and then once you serve, lay all of that out in
24 your affidavit of service as to what you did and why, okay?

25 MR. SCHWEITZER: Yes, your Honor.

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1 THE COURT: Thank you.

2 (Court adjourned)

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